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The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
1925 K Street, NW
Washington, DC 20423-0001

Re: STB Ex Parte No. 582 (Sub-No. 1), "Major Rail Consolidation Procedures"

Dear Secretary Williams:

Enclosed for filing in the above-referenced matter are an original and 25 copies of the Reply Comments of CSX Corporation and CSX Transportation, Inc., together with a WordPerfect diskette. A certificate of service accompanies the document.

Kindly date-stamp the extra copy of this letter and the Reply Comments, which our messenger is presenting, and return them to the messenger.

If there are any questions concerning this matter, please call the undersigned at (202) 942-5858.

Sincerely yours,

Dennis G. Lyons
*Counsel for CSX Corporation and CSX Transportation, Inc.*

rjm
Enclosures
cc All Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 582 (Sub-No. 1)

# MAJOR RAIL CONSOLIDATION PROCEDURES

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## REPLY COMMENTS OF CSX CORPORATION AND CSX TRANSPORTATION, INC.

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December 18, 2000

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

# REPLY COMMENTS OF CSX CORPORATION AND CSX TRANSPORTATION, INC.

Pursuant to the Board's Notice of Proposed Rulemaking ("NPR") served October 3, 2000, and further to their Opening Comments filed on November 17, 2000, CSX Corporation and CSX Transportation, Inc. submit these Reply Comments on the proposed rules governing major rail consolidations set forth in the NPR.[1]

[1] We will refer to the Advance Notice of Proposed Rulemaking served March 30, 2000, as "ANPR." CSX Corporation and CSX Transportation, Inc. will collectively be referred to as "CSX." Conventional abbreviations will be used for other carriers. The existing railroad consolidation regulations found in Part 1180 of Title 49 C.F.R. will be referred to by the section numbers in Title 49 without repetition of the identification of that Title. The regulations proposed in the NPR will be referred to as "Proposed § 1180.x" as identified in the NPR. "Merger" and "Consolidation" will be used interchangeably to refer not only to statutory mergers and consolidations, but also to other forms of combination of substantially all the properties of two rail carriers into a common control.

## INTRODUCTION AND SUMMARY

In these reply comments, CSX discusses a number of the proposals of the Board and analyzes and replies to the efforts of various commenters to change the Board's approach in major ways.[2]

CSX in its initial comments identified many positive steps taken by the Board in its proposed rules. However, CSX raised serious questions concerning the Board's proposal to require merger applicants to make offerings of unidentifiable and unquantifiable forced access, all unrelated to any demonstrable competitive harm arising out of the transaction. In particular, the proposed rules call for such "competitive enhancements" on the highly dubious premise that future mergers will inevitably, in some way, be anticompetitive. This premise is wholly unsupported by any evidence and seems unlikely to be supportable given that future Class I transactions will be primarily end-to-end and given that the long-established policy of this agency and its predecessor has been to cure any specific, identifiable competitive harms resulting from any proposed merger.

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2 Failure of CSX to comment on any of the comments made by the many commenting parties does not signify consent or acquiescence therein. CSX has endeavored to restrict the present Reply Comments to the highlights of certain of the main issues raised in the round of opening comments made through November 17, 2000.

The idea of requiring "unrelated competitive enhancements" has garnered essentially no support among commenting shippers and major carriers alike. Although the reasons for nonsupport vary, it is clear that with such a rule the Board's review of future mergers would become so arbitrary, unpredictable, and so inefficient as to approach the unmanageable. The cost of such an approach may be to eliminate all mergers, both good and bad. No aspect of the Board's proposal need to be rethought more than this, and none has engendered less support. (*See* Part I, below.)

Many shippers advocate a superficially alluring fix of "specificity," which would involve the Board's legislating various specific "remedial" measures of manufactured "competition." While "specificity" sounds like something that would remedy the uncertainty complained of here, in fact, these proposals simply are calls for yet further reregulation. Broad-scale reregulation, or reregulation occasioned through merger conditions, each promise a return to the inefficiencies and other problems that plagued the industry before the passage of the Staggers Act, and the Board should resist these calls. CSX, in contrast, submits that the Board ought not to prescribe outcomes through this proceeding, and instead should utilize an objective, transparent methodology for analyzing mergers that is based on widely accepted competition principles. Doing so will foster a merger review process that addresses competitive issues without hindering network efficiencies that benefit shippers or creating disincentives to form pro-competitive mergers in the first place. (Parts II and III.)

Sensitive to service failures experienced from past mergers, many commenters asked the Board to become a claims tribunal in which to litigate service failures associated with mergers or alternatively to create new extra-judicial bodies to arbitrate such claims. The Board properly resisted these same requests at the ANPR stage of this proceeding, and nothing in these comments presents any materially different considerations. In this regard, the Board "got it right," and should continue to rely on thorough and careful integration planning and the ability of parties to protect these interests through established legal mechanisms and market-based negotiations. (Part IV.)

As was the case in the ANPR process, shortline railroads have called for a rewriting of the agreements that created them under the banner of "removal of paper and steel barriers." These commenters have failed to articulate how these barriers relate in any way to harms caused in the past by mergers or likely to be caused by future merger transactions. As such, they are merely seeking to reregulate the marketplace through selective rewriting of the arrangements which they negotiated at the time of their creation. As in the case with service assurance planning, such requests for Board intervention are mere attempts at reregulation and should not be granted. (Part V.)

CSX presents its response to comments of labor unions which would have the Board renounce a statutory power which it possesses and which the Board has used correctly and judiciously over the years. It also addresses other comments made by the unions. (Part VI.)

A number of commenters oppose provisions in the proposed rules that would call for merger applicants to identify ways to alleviate potential competitive harms and to negotiate with third parties affected by the merger in an effort to resolve their concerns. The fears expressed by these commenters are unfounded and the Board's consideration of both sides' proposals to resolve competitive harms and its fostering of free-market negotiations are each efficient ways to deal with issues surrounding a merger, and ways that do not presuppose regulatory solutions for issues that parties are fully capable of addressing themselves. Furthermore, these provisions in no way limit the Board's ability to address any issues it has the jurisdiction to address and to order such relief as is consistent with its conditioning authority. (Part VII.)

CSX also describes several passenger service issues and oversight and service council issues raised by a number of commenters. CSX believes that the Board should provide that passenger and certain other interests participate in service councils. CSX disagrees with commenters who advocate giving passenger rail agencies the ability to obtain through the Board's merger regulations greater rights than they are accorded under their contracts with freight railroads. (Part VIII.)

Finally, certain commenters proposed changing the scope of the Board's oversight jurisdiction so that applicants would be made responsible for any unforeseen consequences of their transaction that emerged during the first five years, or even later. That is wrongheaded. CSX believes that the approach the Board is taking in the proposed rules is the right one: that parties should be permitted and encouraged to deal with and recognize problems, estimate their scope and work out an agreement with parties likely to be affected. Such an approach makes the best use of the Board's resources and addresses issues with market-driven solutions. (Part IX.)

## I. THERE IS BROAD CONSENSUS THAT THE PROVISIONS OF THE PROPOSED RULES CONCERNING THE REQUIREMENT FOR A "BASKET" OF "COMPETITIVE ENHANCEMENTS" UNRELATED TO ANY SPECIFIC HARMS ARISING OUT OF THE TRANSACTION ARE INAPPROPRIATE AND WOULD CAUSE HARMFUL RESULTS.

In its opening comments, CSX found much that was good in the Board's proposed rules, particularly in the Board's rejection of the proposal, made by a number of interests in the ANPR phase, to reregulate the industry through the institution of widespread forced access, either as a condition upon mergers or through proceedings unrelated to mergers.

The principal difficulty that CSX had with the Board's proposed rules was, however, with the Board's proposal to require inherently unidentifiable and certainly unquantifiable provisions that the Board presents as "enhanced competition." Proposed § 1180.1(c). A striking fact brought out by the opening comments of other parties is that not only do the major railroads oppose these provisions, but that they are joined in a common ground by virtually all the commenting shippers and shipper groups. The amount of shipper support that the Board's proposal received with respect to its requirement of a "bundle" of unrelated "competitive enhancements" supposed to counterbalance assumed generic vices incident to rail mergers is essentially nonexistent.

Before turning to a discussion of this common ground, CSX must emphasize that it views the concept of any forced "competitive enhancement" that is unrelated to the cure of identifiable merger-created competitive problems (an "unrelated competitive enhancement") to be a form of reregulation. CSX accordingly fundamentally disagrees with the many commenters who, while rejecting the Board's view of how to "enhance competition," nonetheless advocate reregulation in some other form, either in the first instance or through the Board's merger conditioning power. As the proper, administrable, and predictable method of analysis, CSX asks that the Board adopt an objective, transparent analytical framework for analyzing mergers that is based on widely accepted competition principles. *See* Part II *infra*. CSX further urges that the Board continue to focus on identifying and remedying potential harms flowing from proposed mergers. *See* Part III *infra*.

CSX, in its opening comments, advanced the position that merger review under the proposed rules would not be appropriate and would render the Board's review of mergers arbitrary, uncertain, and unmanageable. Those consequences flow from the Board's proposed presumptions of competitive harm and service integration failures, in turn leading to the proposed requirement to manufacture "competitive enhancements," unrelated to addressing merger-specific harms. Prominent commenters in agreement with CSX's opposition to the proposal include the National Industrial Transportation League and the U.S. Department of Transportation, among others.[3] NIT League argued that "the proposed rules . . . provide neither shippers nor carriers with clear notice of what is required, and what will be expected, in the area of 'enhanced competition.'" NITL at 10; *see also id.*

[3] Part I.A contains a thorough catalog of shipper commenters in agreement with CSX that the proposed rules as to unrelated competitive enhancements are not appropriate.

at 15 (expressing concern about "what quantum of 'enhanced competition' will be necessary to win agency approval of a proposed transaction"). US DOT at 1.[4]

### A. The Proposal for Unrelated Competitive Enhancements Is Rejected Both by the Major Railroads and by Shippers

As noted above, CSX respectfully disagrees with the Board's proposal to require an unidentified quantum of provisions for unrelated "enhanced competition." Proposed § 1180.1(c). These provisions were not, the Board made clear, to be made to remediate specific harms to competition caused by a merger. NPR at 13. The Board has made plain in the past that remediation would be expected directly as to any specific material competitive harm that diminished in a substantial way the competitive opportunities available to a particular shipper or shippers. While that proposition was apparently not abandoned in the NPR, the different requirement of unrelated competitive enhancement was proposed. In doing this, the Board proceeded from an assumed premise that there was inevitably some inherent, unspecified damage to the public interest in any large-carrier rail merger. NPR at 13. This unquantifiable damage was postulated to occur through diminution of competition of a sort that could not be remedied through specific measures (loss of geographic competition was used as an example) and through

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[4] Because most commenters (like CSX) did not provide acronyms, we provide our own for ease of citation. All references are to the November 17, 2000, opening round of comments on the NPR unless otherwise stated.

potential, albeit temporary, disruption in operations incident to the implementation of the transaction itself. *Id.*

These assumptions of inevitable harm have caused the Board to view mergers as presumptively bad and thus to require, if a merger is to be approved, something that appears to be an affirmative enhancement to competition supposed to counterbalance those assumed harms. The examples the Board gave tended to look like various measures of forced access, such as trackage rights, shared or joint access areas, *etc.* *Id.* Because the harms to be outweighed were not specific as to damage to particular shippers, according to the Board the remediation need not, and in a sense could not, be specific to any particular harms, or to any specific geographic area, or to any specific shipper or group of shippers.

CSX spent considerable space in its opening comments in questioning the premises of this requirement and the requirement itself. CSX at 35-50. CSX stated its view that there is no inherent competitive vice in rail mergers and that any specific competitive harms that they cause could and should be remediated directly. In addition, there was no point in attempting to atone for operational problems in the transitional implementation stage through random forced access. Indeed, attempting to compel additional movements in that way at precisely the time the carrier is facing the greatest challenges, would be counterproductive. CSX maintained that implementation challenges should be addressed directly through enhanced planning, oversight, monitoring, and problem resolution teams. Forced access, unrelated to the solving of specific competitive problems, would be nothing more than a regulatory handout and would levy a regulatory toll upon the transaction, which would interfere with its benefits and efficiencies. Indeed, such gratuitous handouts could discourage or even prevent consummating the transaction altogether. CSX at 46-49.

The CSX comments also made the point that because the regulatory handouts in question, by definition, were not related to specific harms, there would be no governing principles as to who should get the handouts — no reasoned basis to decide where to begin, nor for that matter, where to stop. Without a principled basis for imposing conditions, that would make merger proceedings less predictable as to their outcome and as to whether the benefits promised by the merger would be achieved. Furthermore, the uncertainty would grossly complicate the Board's proceedings by making obsolete the "existing circumstances" rule, which has precluded relief in a merger case from a particular situation that is antecedent to, and not caused by, the merger. The effect of all this also would be to make rail merger proceedings more protracted than they already are — exacerbating seriously a situation in which such proceedings are already materially more time consuming, more disruptive, and more expensive than merger reviews elsewhere in the American economy. CSX at 36-43.

The opening comments filed by the Association of American Railroads, speaking for that association's entire membership with the exception of CN, and the opening comments of other individual large railroads, made the same points or similar points with respect to the requirement for so-called "competitive enhancements" unrelated to definable competitive harms caused by a transaction.[5]

One might think that such unanimity among the large railroads was to be expected, and perhaps the Board might accordingly discount that unanimity. But we suggest that before the Board does so, it study closely the reactions of the shipper community to the "unrelated competitive enhancements" proposal. In fact, the shipper community showed no perceptible enthusiasm for the proposal. In many cases, the unrelated competitive enhancement proposal was not mentioned at all. If it was mentioned, it was sometimes expressly dismissed as irrelevant to the needs and interests of the commenting shipper. In other cases, token praise was given to the principle of unrelated enhanced competition, but immediately the proposal was reinterpreted by the commenting shipper, changing it into something entirely different from what it was in fact. In many cases, the Board's unrelated competitive enhancement proposal, in the hands of a shipper, metamorphosed into a general "forced access" proposal for the whole industry, even though that sort of

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[5] AAR at 6-13, 15-19; BNSF at 23-43; UP at 12-13; NS at 13-32; CP at 8-13; CN at 11-15. *See also* KCS at 12-13, WC at 2-3.

sweeping reregulation had been emphatically rejected by the Board. *See* NPR at 16-17.

A clear and frank statement was made by The Proctor & Gamble Company in its comments. The comments made it plain that "the concept of using conditions to off-set merger harms in an indirect manner will not meet our needs as a shipper." P&G at 5. If merger harms cannot be mitigated directly, the P&G comments said, "the merger should be disapproved." *Id.* Indeed, no shipper appears to have said that the bestowal of unrelated competitive enhancement as a supposed atonement for supposed generic vices of a merger would be of benefit to it as a shipper.

A brief review of the remaining shipper comments will reveal that, while they certainly vary in other respects, they are consistent in their lack of enthusiasm for the Board's unrelated competitive enhancement proposal.

- Shell Oil/Shell Chemical find that the Board's proposal "falls far short of adequately addressing these issues" (Shell at 9) and proposes definite "structural changes" in its place. *Id.* at 9-10.

- BASF Corporation characterizes what the Board had done as "stop[ping] short of any meaningful change." BASF at 5. BASF takes the position that remediation of competitive harms must be "specific" with respect to "each" competitive harm. *Id.* at 13.

- Bunge Corporation finds little good with respect to the Board's unrelated competitive enhancement proposal. Bunge at 4-5.

- The analysis by "Certain Coal Shippers," Otter Tail Power Company, *et al.*, reviews the Board's efforts to enhance competition and finds nothing favorable to comment on in the proposals for handouts unrelated to specific competitive harms. Otter Tail, *et al.*, at 2. Indeed, these comments make the point, underlined by CSX and others, that such regulatory handouts in the context of a merger "would result in an unbalanced industry," "where the merged railroad would be required to provide access, rates and service its competitors do not have to provide," an outcome which the commenters did not favor. *Id.* at 12.

- Another group of coal shippers, the Committee to Improve American Coal Transportation ("IMPACT"), ignore the Board's proposal *in toto* and ask the Board to recreate a regime in which there would be at least three large carriers in the Eastern United States and three in the West. IMPACT *passim.*

- Dow Chemical Company likewise takes an industry-wide view, ignoring the Board's proposal for a basket of increased access unrelated to specific merger harms, and instead calls for reregulation of the entire industry through forced access: one of its captions says "Competition Cannot Truly Be Enhanced Unless It Extends to the Entire Rail Industry." Dow at 6-8.

- E. I. du Pont de Nemours and Company provides a lengthy list of particulars of those of the Board's proposals which it endorses. DuPont at 4-6. The proposal that applicants, in order to atone for the supposed inherent evils of mergers, provide a basket of unrelated, manufactured competitive enhancements is not included in DuPont's list.

- The Edison Electric Institute ignores the Board's proposal that we have been discussing and calls for industry-wide reregulation. EEI at 6.

- Similarly, Enterprise Products Operating L.P. takes the view that the Board had "squandered" an opportunity to make a positive contribution (Enterprise Products at 4) and proposes a lengthy set of conditions providing for various kinds of forced access across the board. *Id.* at 9-11.

- Also, IMC Global Inc. sees little good in what the Board had done and expresses the view that if anything were done, it should be done across the board and not simply through merger conditions. IMC Global at 6.

- The comments of Martin Marietta Materials say that the Board has provided only "lip service" to enhancing competition and that the Board's proposal improperly reserves "unfettered discretion" to the Board. Martin Marietta at 4.

- PPL Generation, LLC, and its affiliate PPL Montana, LLC, coal-burning utilities, have nothing good to say about the proposal and in fact object to the indirect mitigation of generic problems, saying that it "raises more questions than it answers" (PPL at 18). The PPL companies fear that the applicants would manipulate the process by increasing competition where competition already was strong. *Id.* at 20.

- Another group of coal shippers, the "Subscribing Coal Shippers," Western Coal Traffic League, *et al.*, say nothing good about the proposal in question and instead propose a series of "access relief conditions" to be mandatorily imposed. Western Coal Traffic League, *et al.*, at 14.

- The comments of the Texas Crushed Stone Company discuss the need for competition for that shipper (and its related shortline railroad, Texas Crushed Stone at 3-7) but express no support for what the Board has proposed on that account.

- The comments of Weyerhaeuser Company feature that company's own list of competitive enhancements, and express no support for the Board's approach. Weyerhaeuser at 3-6.

- The comments of Williams Energy Services expressly reject the Board's proposal, and state its belief that every major shipper would ask for a competitive enhancement for itself and that, without any defined set of criteria or procedures, the ensuing result would not be satisfactory. Williams at 15.

If any of the shipper-related interests might have been expected to support the Board's proposal to offset supposed generic vices inherent in mergers with an offering of doses of manufactured competition, unrelated to any harm and unquantified, it would have been the major shipper organizations. Their institutional interests as brokers for their members could be well served in the short term by such a rule. But here again, even with these likely sources, a party looking for support in the shipper community for the Board's proposal would be greatly disappointed.

The American Chemistry Council,[6] along with the American Plastics Council, gives up on the Board altogether, announcing its intention to support a transfer of the Board's "authority to approve rail mergers" to the Department of Justice. CMA at 2. Of course, as developed in our opening comments, the DOJ does not look to the creation of unrelated, manufactured competition as a remedy for competitive harms found in a merger transaction, nor does it presume that a merger is either competitively "good" or "bad." CSX at 25-35. Alternatively, these two trade associations call for a general reregulation of the industry, including a relatively frank resurrection of the DT&I conditions. CMA at 3-7. Despite the warm endorsement of other forms of regulatory activism, the use of mandated unrelated benefits ("some undefined quantum of 'enhanced competition'") as a remedy is expressly criticized. *Id.* at 12.

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6 Formerly "Chemical Manufacturers Association."

The National Industrial Transportation League is less blunt about its objectives, does not voice support for the snuffing of the Board's authority, and joins with the Board in expressing fears of damage to geographic competition from end-to-end mergers. NITL at 7-8. While applauding the general concept of "enhanced competition," the NITL urges a substantial rewriting of the Board's proposal. *Id.* at 10-12. Importantly, the comments reject "offsets" that do not remediate specific problems (*id.* at 12-13). Finally, the NITL comments let the cat out of the bag; what NITL wants is a total reregulation of the industry: having supported the introduction of general forced access on the merging carriers, NITL then observes that this would create an imbalance between those carriers and carriers which had not merged. The Board, says NITL, using its other powers, should then equalize the situation by imposing similar obligations on other Class I carriers. *Id.* at 15-16. After all, the NITL reasons, the unilateral imposition of forced access rights on the merging parties could be anticompetitive unless it were balanced — of course one of the arguments that CSX and others have made against forced access merger conditions in the first place.

The bottom line for these two major shipper groups is that (apart from American Chemistry Council's desire to have the Board's powers transferred to the Justice Department) both seem interested in general forced access regimes, not in the Board's proposal.

Little if any support for the Board's unrelated competitive enhancements proposal can be found in the comments of other shipper groups filing comments.[7]

- The Alliance for Rail Competition appears to reject the Board's proposal. It says that "increasing the discretion of the Board regarding how it balances the railroads' future merger proposals with the need for enhanced rail-to-rail competition will not likely improve the chances that any future merger will produce different results" — that is, different from what it views as the dire outcome of the "past several major mergers." ARC at 1-2.

- The comments of the American Forest & Paper Association simply incorporate by reference the comments of the Alliance for Rail Competition.

- The comments of the American Forest Resource Council, in a few words, reject the Board's unrelated competitive enhancements proposal root and branch and say that "our concerns have not been adequately addressed." AFRC at 2.

- The comments of the American Farm Bureau Federation say that the Board's proposals are not "meaningful" and that the Board has missed its opportunity. AFBF at 1.

- Consumers United for Rail Equity want across-the-board mandatory increased access of various sorts, mergers or no mergers (CURE at 4-5) and finds the Board's unrelated competitive enhancements proposal "discretionary" and falling short of protecting the public interest. *Id.* at 7-9.

- Comments filed by The Fertilizer Institute (jointly with the Canadian Fertilizer Institute) also repeat the "lip service" complaint and say that the Board's proposal does not strike "a proper balance." Fertilizer Inst. at 6.

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[7] Among shipper interests, only comments of the National Mining Association, which briefly discuss Proposed § 1180.1(c), speak of it with approval, but without any discussion in depth. National Mining at 2.

- The National Grain and Feed Association expresses little satisfaction with the Board's proposals with respect to competition, including the proposals for enhanced competition unrelated to specific merger harms. NGFA at 4-5.

- A group of wheat, barley and grain commissions from the Great Plains and northwestern states (Montana Wheat & Barley Committee, *et al.*) rejects the Board's approach to the enhancement of competition. Montana Wheat & Barley at 2.[8]

Our discussion of the positions taken by the shipper interests is, of course, not intended to indicate agreement with those positions. The positions of the shippers are varied. Some seek to use the occurrence of major mergers to impose a step-by-step reregulation of the industry. Others propose to effect that reregulation through other means, all at once. Still others have more modest agendas and seek

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8 There is one group which does seem to like the Board's proposal; that is the shortlines. *See* Part V, below. Their principal goal is to undo the very contracts which gave them birth by keeping the benefits which they obtained from the contracts while shedding some of their obligations. This effort, described as the removal of "paper barriers" (the contracts having been written on paper) or sometimes "steel barriers," is, of course, completely unrelated to any merger transaction. Moreover, the Board under even its existing rules prevents the expansion of contractual obligations of the sort complained of by the shortlines in connection with any merger; the merger cannot change the geographic "reach" of the contractual stipulation. *CSX/NS-Conrail*, F.D. 33388, Decision No. 86, served July 23, 1998, at 178 (Condition 39). The Board has taken other steps, in effect looking through the shortlines to the shippers located on them, to prevent merger related harm to shippers on shortlines. *Id.* at 56 (interline service). Because the Board's proposal concerning "enhanced competition" as a balancing "benefit," albeit unrelated to any harm caused by the merger is itself of the nature of a handout triggered by a merger but not related to it, it fits well with the agenda of the shortlines to use mergers involving Class I carriers as occasions to escape from their basic contractual commitments.

to prevent mergers from having specific anticompetitive effects, a goal which CSX shares although it may not endorse the specific proposals of particular shippers in that respect. Other shipper interests claim that the Board's proposals to preserve competition fall below the Board's present standards; if there is language in the Board's proposals or discussion in the NPR that can be read to say that, we would agree that it should be clarified.

What the comments do demonstrate, however, is that there is little if any support on the part of the shippers and their organizations for the random and arbitrary insertion of "manufactured competition" not related to any specific merger harm. The shippers' reasons may include only a few of the reasons that led CSX and the other major railroads to oppose this particular proposal of the Board. Shippers may oppose it because it produces unpredictable, random outcomes, and can itself be anticompetitive by creating an uneven playing field. On those points, CSX is in agreement with the shippers.

The bottom line is that neither the large rail carriers nor the shipper interests favor the Board's proposal. We respectfully suggest that that is a separate and independent reason for the Board not to pursue its proposal. It adds to the reasons given in our opening comments.

### B. Implementation of the Board's Unrelated Competitive Harm Proposal Would Cause the Merger Review Process to Deteriorate into an Attempt by Unaffected Parties to Obtain Regulatory Spoils

CSX cautioned in its opening comments that the most immediate consequence, which would originate from the Board's unrelated competitive enhancements proposal, is that the merger review process would sink into a struggle for regulatory spoils among unharmed parties. The creation of those regulatory spoils, in turn, would disrupt and diminish the efficient operation of competitive rail networks that good mergers could create. Requiring merger applicants to propose an indeterminate package of "competitive enhancements," moreover, would disconnect the Board from its well-established and practical line of precedents, which establish the proposition that merger conditions are imposed to cure only transaction-related problems, not existing situations. The "existing situations" rule allows the Board a simple and fair means of disposing of a substantial portion of pleas for relief by condition-seekers unharmed by the transaction. CSX at 36-43.

Many opening comments filed in this proceeding provide strong evidence that the cautionary words of CSX deserve the Board's attention. Some comments have gone so far as to ask, explicitly, that the Board provide better instructions concerning where to line up for a piece of regulatory pie. The Oklahoma Department of Transportation, in particular, complains that the Board's "enhanced competition" proposal "do[es] not specify how or where parties can request it." ODOT at 5. ODOT expresses regret that the Board has not pursued the egalitarian goal of "equaliz[ing] competitive opportunities among regions, shippers, or railroads." *Id.* at 6. ODOT thus suggests various rule changes to "ensure that short lines and rural shippers they serve get their fair share of the enhanced competition that is created as a result of any future merger." *Id.* Other comments advocate, in essence, that the Board require merger applicants to go door-to-door, canvassing "states, rail users, and Class II and III railroads" to determine what they all "envision as effective ways to enhance competition." ODOT at 4. If the applicants were to disagree with any one of these parties' visions of "enhanced competition," the ORDC would like to place the burden on the applicants to prove that the envisioned enhancement "would unduly impact the proposed merger." *Id.*

If the Board were to award "competitive enhancements" to some but not others, there no doubt would be criticisms of arbitrariness or favoritism. Indeed, ungrounded in, and unguided by, judicially tested standards, the Board's grant of any benefits unrelated to specific merger harms would be vulnerable to judicial-review challenge by spurned benefits-seekers who feel entitled to "their fair share." *See* CSX at 42-43. CSX respectfully submits that the fact that the Board's "enhanced competition" proposal would create a competition for regulatory spoils, which the Board could not rationally and reasonably referee, is an independent reason for its not adopting this proposal.

### C. The Proposed Process Would Threaten to Eliminate Mergers that Would Be in the Public Interest

Even under the best of circumstances, subjecting proposed transactions to regulatory review imposes costs. Cost savings and efficiencies achievable by the transaction are delayed. The applicants' personnel ranks suffer from attrition, as some employees seek greater security. For many of the skilled personnel who do not leave, their attention is diverted from operating the business to navigating it through a regulatory maze. Still, these transitory costs generally do not stop mergers that create more efficient railroads. On the other hand, to the extent regulatory rules can burden the transaction with costs not needed to remediate competitive harms, and to the extent that enforcement guidelines lack predictive value, at least the specter of what may be overwhelming costs will unnecessarily threaten to distort the economies of corporate combinations. Such distortion likely would have a chilling effect on beneficial mergers, preventing the good together with the bad. CSX urges the Board to consider carefully the suggestions in the sections that follow, which are designed to minimize the potential for this unfortunate outcome.

## II. THE BOARD BEST COULD STRENGTHEN THE PROPOSED RULES BY MAKING CLEAR THAT ITS COMPETITION ANALYSIS WILL BE OBJECTIVE, TRANSPARENT, AND BASED ON WIDELY ACCEPTED PRINCIPLES

Merger enforcement guidelines are useful only to the extent they facilitate consistent application of the law and help industry predict whether government regulators will challenge a particular transaction. To have predictive value, guidelines must be transparent and objective. They must articulate, with reasonable clarity, the objective rules that will govern the regulator's analysis. In addition, the analytical framework must be based on sound theory and robust empirical evidence. Otherwise, those guidelines perversely may produce inefficiency and a reduction in consumer welfare. Moreover, to the extent that enforcement guidelines lack predictive value, and lead to uncertain and arbitrary results, they threaten to discourage mergers that would be in the public interest.

There is broad consensus that the Board's proposed rules fail to present a coherent analytical framework for the evaluation of future mergers. Divisions run deep, however, between two schools of thought regarding how best to correct this deficiency. As discussed in Part I.A, many commenters suggest a fix of "specificity," which would involve the Board's legislating some group of inefficient regulatory measures of manufactured "competition." CSX, to the contrary, submits that the Board ought not prescribe outcomes through this proceeding. It ought to adhere to its established, objective methodology for analyzing whether a particular proposed merger creates a competitive problem, and then fashion relief to solve the problem identified, if it can be solved. If it cannot fashion effective relief, and if the merger is found, on balance, to be anticompetitive, the Board then should prohibit the merger.

### A. Many Commenters Misinterpret the Purpose of the NPR and Ask the Board to Commit in Advance to Reregulatory Measures

Many commenters, who share CSX's general concerns about the "unrelated competitive enhancements," have suggested that the parameters and scope of reregulation be specified in advance as the appropriate cost to be paid by any future merger applicant. The U.S. Department of Transportation, for example, calls on the Board to offer "additional guidance" to merger applicants, in the form of "concrete examples," concerning "what types" of "competitive enhancements" they ought to propose, "and how extensive such measures would have to be." US DOT at 3-4. The Board specifically could "direct[ ]" applicants "that geographic competition would be enhanced by adopting open switching practices in terminal areas . . . ." *Id.* at 4.

Others are even more bold in seeking reregulation. The American Farm Bureau Federation has chastised the Board for "miss[ing] the opportunity to mandate conditions that will improve competitive conditions for captive and near-captive shippers." AFBF at 1. "Certain Coal Shippers," Otter Tail Power Company, *et al.*, have called on the Board to reduce uncertainty by demanding various specific remedies from all merging carriers. If this wish list of remedies were granted, merger applicants would be required, among other things: to provide rates and service terms upon request generally over bottleneck segments of track; to provide reciprocal switching and trackage rights from terminal points to facilities served by only one major railroad; and to eliminate "paper barriers." Otter Tail, *et al.*, at 14, 18, 19. "Subscribing Coal Shippers," WCTL, *et al.*, similarly implore the Board to carve into stone "specific conditions that will require merging carriers to open up their systems to increased competition via the access, bottleneck and paper barrier relief conditions," which they proposed in ANPR comments. WCTL, *et al.*, at 5. The opening comments of the Edison Electric Institute offer another fine example of a request for specificity. EEI asks, among other things, that the Board require merging railroads to offer bottleneck rates and terminal trackage rights, to eliminate "paper barriers," and to keep gateways "economically" open. EEI at 6-10.

These various calls for "specificity," at bottom, amount to little more than calls for industry-wide reregulation. At times, commenters openly lament the fact that the Board's proposed rules set forth a handful of new principles rather than changes that affect outcomes. *See, e.g.*, Western Coal Traffic League, *et al.*, at 11-13; AFBF at 1. Many openly seek redress for what they perceive to be the "past sins" of railroad mergers. Often, they explicitly call for the Board to reregulate the industry either through this proceeding or another. *See, e.g.*, US DOT at 6 (access or bottleneck relief "should be the subject of a separate, industry-wide, rulemaking"); Otter Tail, *et al.*, at 12 ("any changes to the [access, rates and service] rules governing rail mergers should be applied to the rail industry as a whole"); Western Coal Traffic League, *et al.* at 11-12 (asking Board to revisit its decision to leave a fundamental policy shift to Congress). Others have suggested, no too subtly, that the Board reregulate through the back door by using its conditioning authority. *See* Part III.B *infra*.

CSX respectfully submits that it would be improper for the Board to adopt commenters' requests to specify reregulatory initiatives that the Board will pursue in the event of a Major Rail Consolidation. The purpose of the Major Rail Consolidation Procedures ought not to be to predetermine specific, mandatory regulatory encumbrances to be applied in all, or even most, situations. Their purpose ought to be to establish that it will pursue an objective analytical framework in which competitive issues are given greater primacy, and through which the Board will determine the public interest.

### B. The Merger Regulations Should Make Clear that, Applying the Board's Already Clearly Articulated Methodology, the Board Will Give Greater Primacy to Competition Issues Over Other Potentially Competing Concerns

The Board has amassed a great deal of specialized knowledge concerning the competitive dynamics of the railroad industry. That knowledge and experience is reflected in a highly sophisticated analytical framework designed to assess the likely competitive effect of any proposed rail merger. That framework sets forth an explicit, comprehensive methodology for analyzing the competitive effects of proposed transactions.

CSX, in its opening comments, respectfully suggested that the Board, in considering any drastically new approach that it might take, look to the approaches taken by its fellow competition enforcers. We pointed out that the Board's proposed presumption of unremediable competitive harm is contrary to the approach of virtually all other federal agencies empowered to regulate competition, including the Justice Department, the Federal Trade Commission, the Federal Energy Regulatory Commission, and the Federal Communications Commission. CSX at 26-29. We then asked the Board to recognize that, consistent with these other agencies' practice, as well as its own, a proper conception of an analysis of the competitive effects of a rail merger must encompass increased rail carrier efficiency, promotive of inter- and intramodal competition. CSX at 29-35; *see also* Port of Seattle at 3 (proposed rules "may not give sufficient weight to economic efficiency gains," which as "[p]ast experience has demonstrated," "will devolve to shippers and ports").

Moreover, the *Merger Guidelines* employed by the DOJ and the FTC, among others,[9] like the traditional approach of the Board, are based on a well-established methodological framework designed to determine the nature and scope of any anticompetitive problem that would be created by a merger. The Board's proposal, as discussed in Part I, in stark contrast would replace the existing rigorous analytical framework with a regulatory morass. Moreover, unlike its current methodology, and those of its sister enforcement agencies, the proposed approach has no support in established economic theory and empirical evidence. Rather, the Board proposes to make the unsupportable leap to the conclusion that additional consolidation among Class I carriers is likely to cause unremediable harm to competition. NPR at 11-12. Further consolidation among Class I carriers, however, likely will involve, in whole or large part, end-to-end combinations of carriers. The Board correctly has concluded, consistent with well established

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9 *See* U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (issued 1992 and rev. 1997), *reprinted* 4 Trade Reg. Rep. (CCH) ¶ 13,104. In 1996, FERC expressly adopted the DOJ/FTC *Merger Guidelines*. *See* Inquiry Concerning the Commission's Merger Policy under the Federal Power Act, 61 Fed. Reg. 68,595, 68,596 (Dec. 30, 1996). The FCC, similarly "use[s] a framework for competitive analysis" that is "embodied in the antitrust laws, including the [DOJ/FTC *Merger Guidelines*]." *In re NYNEX Corp.–and–Bell Atlantic Corp.*, 12 F.C.C.R. 19985, ¶ 37 (1997).

thinking in the area of antitrust economics, that vertical combinations generally will not result in competitive harm.[10]

## III. IT IS PARAMOUNT THAT REMEDIES FOR POTENTIAL HARMS BE LIMITED TO ONLY THOSE REMEDIES THAT ADDRESS THE SPECIFIC HARMS IDENTIFIED AS RESULTING FROM THE MERGER

### A. The Board Properly Has Recognized that Its Statutory Grant Does Not Permit It to Reregulate Through this Rulemaking and It Should Disregard the Comments that Advocate the Use of the Rulemaking to Do So.

Certain shipper groups and individual shippers openly advocate that the Board use this opportunity to revise its procedures for reviewing rail mergers as an opportunity to restructure the rail industry under its broad regulatory powers. These shippers have asked the Board to adopt rules to: (1) impose forced "competitive access" conditions; (2) to resurrect DT&I conditions; and (3) to revise its bottleneck rules to "prevent future damage and to remedy the legacy of past mergers." BASF at 33; Fertilizer Inst. at 10-11; Montana Wheat & Barley at 2; NITL at 19-20.

The Board properly has rejected such shortsighted, self-serving proposals as being outside the scope of the NPR. Perhaps more importantly, the Board has continued to reject industry-wide restructuring through forced access in its newly

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[10] *CSX Corp., et al.—Control and Operating Leases/Agreements—Conrail Inc.*, Finance Docket No. 33388, Decision No. 89, at 49 (served July 23, 1998).

proposed rules. In its commentary to the proposed rules, the Board properly explained that industry-wide restructuring would be a return to reregulation in direct contravention of the Staggers Act — the Board's governing legislation — and also would hamper significantly the long-term viability of the railroad industry to the detriment of all shippers and consumers. NPR at 16-17.

Although they may have a short-run benefit for a specific shipper, forced access proposals would destroy the free market competition that has produced the post-Staggers public benefits. Indeed, Board precedent establishes that a transfer of profitability from one private party to another at the expense of a lessening of free market competition is not a public benefit, but instead is a private benefit and a public loss. *CSX—Control—Chessie System, Inc., & Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 521, 551-552 (1980), *aff'd sub nom. Brotherhood of Maintenance of Way Employees v. ICC*, 698 F. 2d 315 (7th Cir. 1983). If the Board were to grant forced access benefits unrelated to specific merger harms, the effect would be private gains by individual shippers at the expense of the efficiencies produced by the merger and, therefore, a public loss.

Under the Staggers Act, the Board has a legislative mandate to rely on competitive market solutions to the maximum extent possible. The Board, therefore, properly has rejected these proposals for reregulation, proposing instead new rules that seek to foster free market competition as the champion of rail industry public benefits.

### B. Others Have Sought to Reregulate Broadly Through the Backdoor of Merger Conditioning

Other shippers seemingly opposed to "reregulation" have submitted comments attempting to disguise such forced access regulatory handouts by cloaking them with a different label, *e.g.*, "competitive enhancements" in the case of NITL (NITL at 10-12 and 15-16) and "structural relief" in the case of Shell (Shell at 5-10). The only practical difference in the approach taken by these shippers is that they do not advocate that the Board reregulate with forced access handouts until a new Class I merger is proposed.

As CSX, other railroads, and the U.S. Department of Transportation previously have explained in their opening comments to this NPR, forced access remedies, even if limited to address perceived harms resulting from a merger under consideration, can have negative economic and logistical consequences that are detrimental to the public benefit. The historical record is filled with examples of how forced economic gateway conditions have prevented merging parties from passing along the cost reductions gained from the efficiencies of the new single line service to shippers in the form of lower rates because they were forced to provide a proportionate joint rate to a connecting competitor. The historical record is also replete with examples of how forced interchanges and rate equalization have impaired the ability of the merging carriers to implement their new single-line service, causing economic injury to many shippers. Other shippers such as PPL, EEI, the National Grain & Feed Association, NIT League, The Fertilizer Institute, American Chemistry Council and Bunge propose generalized rate regulation in one form or another.[11] Some attempt to second-guess the market and disallow a portion of the costs of corporate acquisitions — permitted under the statutorily required generally accepted accounting principles — and propose a new system of rate regulation, with new rate caps. *See, e.g.*, American Chemistry Council (CMA) at 3. Others propose regulations that would disallow rate increases for "similar" commodities over "similar" routes. *See, e.g.*, Bunge at 5-6.

The dangers of pervasive rate regulation also are well documented in the historical record. Rate regulation is the antithesis of free market competition because it locks the industry into static commercial standards that, even if correct when imposed, lack the flexibility to respond to market forces. Moreover, rate caps often have proved to act as a benchmark for rate floors because the restrictions against rate increases have a chilling effect on carriers that otherwise would pass along as lower rates the cost savings produced by efficiencies. The old

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[11] PPL at 5-8; EEI at 6-8; National Grain and Feed Association at 5-6; NITL at 20; Fertilizer Inst. at 10-11; American Chemical Council (CMA) at 2-3; Bunge at 5-6.

system of rate regulation hung over the railroad industry for decades longer than it should have been tolerated, and led to the general malaise of the American freight railroads in the 1960s and 1970s. The Staggers Act balanced matters by shrinking the system of rate regulation to the point where its benefits could be said to balance its detriments. To undo the balance effected by the Staggers Act, and increase rate regulation through the guise of merger conditions, would be a risky and unwarranted essay in reregulation, and one which would trench on the responsibilities of Congress.

Mergers should not be used as a device to increase rate regulation in the rail industry. Proposals to do that should stand or fall on their own merits — or lack of them. Consistent with its objective of enhancing free market competition in the rail industry, the Board's merger rules should limit the use of its remedial conditioning power to specific merger-created harms. The new rules should limit gateway relief to important transcontinental (or similar international) preexisting gateways, with established origin and destination pair flows on a commodity-specific basis. Similarly, the Board should continue to limit the bottleneck exception to situations where there are existing contracts. Doing otherwise constitutes adoption of a reregulatory agenda rather than the proper use of Congress' delegation of merger conditioning authority.

In determining whether a proposed merger is in the public interest, the Board's public interest determination properly requires the Board to limit its consideration of public benefits to only those benefits "that will result from the transaction." *CSX — Control — Chessie*, 363 I.C.C. at 552. As CSX pointed out in its opening comments, in determining whether a merger is in the public interest, the Board should weigh the competitive benefits against the likely competitive harm caused by the merger. CSX at 46-48. The consideration of preexisting conditions not having any relation to the merger have no place in such an analytical approach and would serve only to render the process arbitrary and unpredictable.

## IV. THE BOARD SHOULD CONTINUE TO REQUIRE THOROUGH INTEGRATION PLANNING, BUT SHOULD NOT BE TURNED INTO A CLAIMS TRIBUNAL FOR SERVICE MISHAPS

A number of shipping interests continue to call upon the Board to undertake responsibilities to resolve compensation claims and apply pecuniary sanctions to carriers arising out of service disruptions that might occur after future mergers. [12] No doubt, the sincere sentiments behind these proposals stem from unfortunate experiences of past service failures which are well documented. Against that same backdrop of voices at the ANPR stage, however, the Board correctly chose not to

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[12] Commenters such as Montana Wheat & Barley at 4; Certain Coal Shippers at 17; and NITL at 20-22, have advocated this.

create monetary penalties to be imposed upon railroads in the wake of service failures, nor to substitute itself or a Board-compelled process for the existing legal standards and available legal forums. [13]

There is nothing in the comments submitted that, in any material way, addresses this issue any differently than it was addressed in the ANPR. Consequently, the Board should continue to provide for thorough integration planning and should not permit itself to be turned into a claims tribunal. Nor should the Board create new bodies for adjudicating service-related claims.

These complaints reflect the unquestionably deep frustration of many rail shippers whose operations were impacted by the service problems encountered in the integration process in prior transactions. But the Board's role should be one of prevention and not of sanction. Board merger rules imposing monetary or other sanctions on carriers will not somehow "motivate" the applicants to do the job right. Anyone who has followed, even casually, the market valuation of merging carriers' stocks following service disruptions will vouch for the fact that applicants will be more than fully motivated to make the integration process go smoothly.

The Board has properly defined its role. It should impose rigorous planning requirements to ensure that operational integration issues are formally addressed,

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[13] Commenters such as National Grain and Feed Association at 11-13, Fertilizer Inst. at 8-9, and Weyerhauser Corporation at 4, have advocated such procedures.

and should closely monitor the operational progress of the integration. All of this should be thorough, but without attempting to command and control the process or to hamstring management's flexibility to adjust on a real-time basis.

That approach certainly does not leave the shipping community without remedies. As noted, there are established legal standards for such claims and the judiciary and private agreements provide numerous established forums — in the rare situations where litigation proves unavoidable. And the marketplace (including rail transportation contracts and the insurance marketplace) offers opportunities for private negotiations and risk allocation even before difficulties might arise.

No shipper has made the case why the courts and other adjudicative bodies to which the parties have been known to submit claims are not up to the task of resolving disputes about service failures. There is nothing in this round of comments (nor in the ANPR that preceded it) that articulates a sound basis for concluding otherwise. Indeed, the courts and the other provisions made by the parties are better equipped for resolving these claims than the Board. Accordingly, the Board should not alter its position on this issue.

## V. SHORTLINE RAILROAD COMMENTS AMOUNT TO REQUESTS FOR FORCED ACCESS OR SUBSIDIZATION

### A. So-Called "Paper" and "Steel" Barriers

The Board has resisted calls by various shortlines and associations representing them to rewrite the agreements that created those shortlines, under the banner of "removal of paper barriers" or of "steel barriers." The Board should continue to do so. These commenters, for the most part, now have abandoned the claim that rewriting those organizational agreements is necessary to avert some competitive or other harm which otherwise would be caused by a merger transaction. See, in particular, the frank acknowledgment in the Housatonic Railroad comments at 5.[14] The Board, in the NPR, treated the requests for dissolution of the contractual provisions as part and parcel of the same "broad program of open access" involving expanded access for shippers; the Board described such a general reregulatory approach as "contrary to our statute and the policies that it embodies," "better left to Congress," if done at all. NPR at 16-17. The Board's treatment was correct.

Most of the shortlines now existing in the United States are a product of the Class I rationalization of unprofitable lines in the 1980s and 1990s, a period also of

[14] The Housatonic comments correctly state that "Class I carriers will assert that many of the issues and concerns raised in these comments exist even in the absence of a major consolidation. Indeed they do."

extensive consolidation among the larger freight railroads. During that time, the Board's treatment of the relationship between shortlines and their shippers on the one hand, and merging railroads on the other, was consistent. If a shortline complained of a merger transaction as tending to create a potentially anticompetitive situation, the issue was analyzed by the Board under its usual tests for the examination of diminutions of rail competition with respect to shippers. The *Conrail* decision is illustrative. The Board ruled that the geographic scope of shortline contractual restrictions could not be extended through expansion of the CSX and NS routes. Finance Docket No. 33388, Decision No. 89, served July 23, 1998, at 178 (Condition No. 39). In addition, the Board in determining impacts on shippers located on shortlines looked through the shortline to the shippers served by it. If a merger would result in competitive harm to a shipper that would have required remediation had the shipper been located on the lines of the Class I carrier, the Board considered applying a similar remedy to the shipper on the shortline. *Id.* at 56 (treatment of "one-to-two" shippers on shortlines, *i.e.*, shippers whose routes originally involved a shortline and Conrail but after the transaction involved a shortline and both CSX and NS).

Continuation of this form of analysis is not enough for some shortlines. Some make a half-hearted attempt to establish that the effect of mergers is generally to increase the "monopoly" said to be enjoyed by Class I railroads.

Accordingly, they say, every merger may make the competitive situation of the Class III carriers (and their shippers) worse. *See* Housatonic at 3. A brief analysis should dispel any such notion. The Class III railroads were, almost universally, created as spin-offs from Class I carriers. Obviously, while the lines in questions were part of the system of a Class I carrier, those lines did not compete against the remainder of that system for business; the marketing and operations of the overall system were unitary. When a shortline was created, the effect may or may not have been to increase preexisting rail-to-rail competition, but clearly it could not have decreased preexisting rail-to-rail competition, there being none between the line and its owner.[15] If, after its creation, a shortline had access, or economic access, only to one Class I carrier, no subsequent merger could adversely affect that condition. Indeed, such subsequent mergers could expand the reach of the Class I connecting carrier of the shortline and provide a broader market for, or broader sources of, shipments from and to shippers on the shortline.

If a shortline had access to multiple Class I carriers upon its organization, and a subsequent merger (say between two of those Class I carriers) diminished that access, the situation would be one for traditional analysis concerning

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[15] Indeed, the "creation" transactions generally were effected under exemptions under 49 U.S.C. § 10502 or its predecessor; the creation of an anticompetitive outcome for shippers in an exemption process would have been contrary to the statute. *See* § 10502(a)(2)(B).

competitive alternatives for the shippers on the shortline. None of the shortline commenters cites any situation where a specific diminution in competition was permitted in an instance of that sort.

There is, accordingly, no case for rewriting the arrangements which were negotiated, of course as a package with the price and financing terms, at the time of the creation of the shortlines. Any "justification" for such a rewriting would have to be based on a theory that manufacturing competition where it does not exist is beneficial and that regulators should look for occasions to do so. That sort of reasoning is contrary to the approach of the Staggers Act, overrides agreed-upon private ordering between parties, and moves the Board in the direction of state planning rather than in support of free-market contractual ordering that promotes the design of efficient rail networks. Moreover, if rewriting these contracts were supported by an overwhelming public policy that was strong enough to justify the negation of contracts (presumably without compensation) there would seem to be no good reason for waiting for the next Class I merger in order to launch such an effort. Indeed, the agenda of the trade association for the smaller carriers is understood to take that approach; it takes the form of a "Bill of Rights" which, like most "Bills of Rights," does not depend on some voluntary transaction such as a merger in order to come into effect. Given all this, the Board quite properly took the view that such a proposal, like other broad access proposals not undertaken to solve merger-created problems, should not be effected under the Board's merger conditioning powers and indeed that doing so would be contrary to the governing statute and the policies it embraces.[16] NPR at 16-17.

The Board thus should not exercise, and does not under its governing statute have, the power to order a general revision of the pertinent contracts either across the board for all carriers or, upon the occasion of a merger, with respect to the Class I carriers that were involved in it. To be sure, the Board listed the termination of "paper barriers" and "steel barriers" as possible "enhanced competition" items that might be included in a "package" to be presented by merger applicants to "counterbalance" supposed inherent vices, competitive and operational, said to be inherent in major rail mergers. *See* Proposed §§ 1180.1(c) and (d) and related discussion in NPR at 12-13, 16-17. But, of course, such "enhancements" of competition, far from enhancing competition, most often will interrupt the creation and operation of efficient rail networks and will deprive Class I carriers of necessary densities to provide more frequent extended single-line service. More fundamentally, they share the difficulties of the other possible "competitive enhancements" that are put forward by the Board in Proposed

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[16] Interestingly, one of the shortline comments contains a Verified Statement of its CEO denouncing the Staggers Act across the Board. *See* Farmrail System at 12-17.

§§ 1180.1(c) and (d). For a fuller treatment of these, we refer the Board to our discussion at Part I, above.

None of this detracts from the proposition that any specific adverse anticompetitive impacts on shortlines and their shippers in a merger should be addressed. To this end, the Board may require an impact statement to be included with an application that addresses a merger's effect on shortlines. We do not oppose efforts by the shortline community to have reasonable provisions for such a statement in the proposed rules.[17] That would offer an assurance that the situation of any particular shortline is not overlooked and that, by furnishing impact statements (which in turn might lead to prefiling discussions with shortlines), a better analysis of any actual competitive harms that might be done to shortlines could be effected in the early stages of the prosecution of the application. But again, that is not to say that every adverse impact of a major rail merger upon a shortline or its shippers is an anticompetitive impact. That observation takes us to another issue raised by a number of shortline commenters which involves the status of shortlines as providers of "essential services."

[17] Current rules already require applicants to address certain impacts on other carriers generally. § 1180.6(a)(2)(v), 1180.7

## B. "Essential Services"

Certain commenters[18] urge that all shortlines be presumed to be providers of "essential services." The Board's proposals, once again, have got it right. The Board discusses "essential services" in Proposed § 1180.1(c)(2)(ii), NPR at 14. The Board there commits itself to "ensure that essential freight, passenger and commuter rail services are preserved." A definition of an existing essential service is provided; it is a service for which there is "sufficient public need" and "where adequate alternative transportation is not available." The bottom line is that the Board is to consider "whether projected shifts in traffic patterns could undermine the ability of the various network links, including Class II and Class III carriers and ports, to sustain essential services."[19]

So the Board's approach is to make particularized factual determinations as to whether some or all of the services rendered by a shortline (or other element in the freight transportation network) are "essential services"; the views of these

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[18] *See* Farmrail System at 7-8; Housatonic at 10. *See also* Oregon DOT at 4 (proposal to change "Essential Services" to just "Services").

[19] Calls for special rules to apply to carriers based on "Class" must in any event be approached cautiously. Many comments of the shortline community lump Class II and Class III carriers into a common group and ask for special protections. Yet, this is hardly a homogenous group. The Wisconsin Central is a Class II railroad but is on the cusp, by its own statement, of becoming a Class I (WC at 10). It is a far cry from the Housatonic or the Eastern Shore.

commenters are that some, or possibly all, of the services rendered by each of the more than 500 shortlines are to be deemed "essential services." The effect of such a presumption would be to protect competitors from mergers rather than competition itself. Just as a merger may assist a shipper on a shortline by providing a broader network in its connecting carriers as a market for the products of shippers on the shortline or a broader and more efficient source for their raw materials, such an extended scope of the network of the Class I carrier likewise may provide the competitors of that shipper on the shortline with a broader scope for their products. That may provide increased competition to that shortline shipper. If that shipper is an important shipper to the shortline in question, the viability of the shortline might be questionable if the shipper is badly damaged by that new competition.

In these circumstances, the Board's "essential services" doctrine is applicable. To be sure, if the market demand for the products of the shipper in question is so limited that the shipper cannot survive enhanced competition from other sources, that shipper itself is obviously not entitled to a regulatory subsidy. The only question the Board properly looks at in such a case is whether other uses of the line in question are such that in the public interest it is necessary to preserve the line, through one means or another, including possible inclusion of the shortline carrier in the merger, in order to protect essential services. The test is not whether the transaction will have an adverse effect upon the shortlines or its shippers by increasing the competition that they face. Proposed § 1180.1(d) makes it plain that "conditions are generally not appropriate to compensate parties who may be disadvantaged by increased competition." It is only the sort of harm that renders a network link without ability to sustain essential services that requires remediation under the Board's analysis.

There is no reason to change that analysis. To do so and to declare every one of the over 500 shortlines an automatic "essential services" provider would necessarily be to protect competitors rather than competition. It would be a subsidy under the guise of protecting competition. That would be bad economics, bad policy and bad law. Shortlines as a group are an important part of the nation's rail infrastructure, and the Board's proposed revisions to its rules quite properly recognize that. And, presumably the Board will continue its analysis as to the actual effects of merger transactions on competition with respect to the furnishing of rail transportation services to shippers located on shortlines, as the Board's actions in the Conrail case indicated. But each shortline is not to be treated like a National Park, a public treasure divorced from the rules and concerns of economics, at least as far as the Board's task and responsibility are concerned.[20] If procompetitive mergers in the railroad structure create new competition which would have an adverse commercial effect on shippers located on shortlines, that is simply the effect of competition, and it would be in a profound sense anticompetitive to prevent that competition from occurring.

## VI. ISSUES CONCERNING EMPLOYEES

In this portion of its Reply Comments, CSX responds to comments on employee protection issues.

### A. The Board Should Defer to Negotiations

CSX remains strongly convinced that negotiations between carriers and labor on the standards applicable to the override or modification of collective bargaining agreements is the best way to resolve this issue. As the Board knows, the largest rail union, the United Transportation Union ("UTU"), and the major carriers, represented by the National Carriers Conference Committee ("NCCC"), have reached such an agreement.

Several non-operating craft unions also stated in their comments a willingness to continue negotiations. Responding to the Board's suggestion,

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[20] Certain shortlines are owned or supported by state or local government agencies; other receive other forms of public assistance. To that extent, the rules of economics can be suspended or mitigated.

The Transportation•Communications International Union, International Association of Machinists and Aerospace Workers International, International Brotherhood of Electrical Workers, and American Train Dispatchers Department of the Brotherhood of Locomotive Engineers, agreed to "attempt a broad agreement on these issues" and "report back to the Board on our progress." TCU Group at 2.

The carriers' belief in the efficacy of continued negotiations is supported by a history of being able to reach consensus on legislative changes[21] and negotiated rulemaking employed by agencies, including DOT itself.[22] For example, the Federal Railroad Administration ("FRA") has for several years been employing a negotiated rulemaking approach, the Railroad Safety Advisory Committee ("RSAC") process, involving carriers and labor to reach consensus on new safety regulations. This process has gone forward even though not all carriers participate in the process. *See, e.g.*, Testimony of Jolene M. Molitoris, FRA Administrator, Before the House Committee on Transportation and Infrastructure at 13 (March 26, 1998) ("RSAC produces consensus on underlying factual issues, the range of

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21 For example, rail management and labor have in the past reached consensus on amendments to the Railroad Retirement Act. *See, e.g.*, Railroad Retirement Solvency Act of 1983, H. Rep. No. 98-30, Part I at 14 ("The reported bill is based on an agreement between rail labor and management.").

22 *See also, e.g.*, 60 Fed. Reg. 1761 (1995).

options, and recommended solutions . . . . RSAC tackles some of FRA's toughest, most controversial regulatory challenges.").

Even if the negotiations based on the NCCC-UTU agreement do not produce a complete consensus, they have already narrowed the issues in dispute, and we believe they have a real potential to produce voluntary settlement.

### B. There Is No Basis to Eliminate the Authority to Override Collective Bargaining Agreements

Rail Labor and DOT argue that the Board should by administrative fiat "abandon," "eliminate" or declare cramdown "dead."[23] This is not a serious argument. The railroads, through their individual comments and the comments of the National Railway Labor Conference ("NRLC"), have explained that the Board cannot do so.

By "cramdown" Rail Labor presumably refers to the process for modifying collective bargaining agreements under the consolidation provisions of the Board's governing statute. Obviously, the term "cramdown" is intended to be pejorative and connote unfairness and unilateral action by carriers with the complicity of the Board and its agents. While perhaps a good sound bite for labor, the term as used is erroneous. The Board's process for changing collective bargaining agreements

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23 Comments of Rail Labor Division of the Transportation Trades Department ("RLD") at 11; Comments of Allied Rail Unions ("ARU") at 5; DOT Comments at 14.

consists of advance notice to unions of proposed changes, negotiations, arbitration, and review by the Board. Judicial review of the Board's decision is also available. Contrary to Rail Labor's spin, carriers are not free to unilaterally implement changes in agreements. While a resolution can be imposed on unions if no voluntary agreement is reached, it is imposed by neutral tribunals, *i.e.*, an arbitrator, the Board, or the courts.

Thus, what Rail Labor really means by "cramdown" is that Labor cannot use its strike weapon to resolve disputes relating to the formation of implementing agreements. But Congress has determined that Rail Labor should not be able to strike over Board-approved railroad consolidations, as discussed in the industry's comments. Congress long ago made the judgment that the approval of railroad consolidations supercedes the requirements of the Railway Labor Act ("RLA") and collective bargaining agreements enforceable under the RLA. As the Board and its predecessor have repeatedly observed, it cannot eliminate or ignore this statutory authority nor the Supreme Court and other appellate court precedents interpreting that authority. Indeed, the Rail Labor Division itself recognized that "the Board cannot by rulemaking amend its governing statute . . . ." Yet, that is exactly what Rail Labor and DOT are asking the Board to do. RLD Comments at 9. Not surprisingly, their comments do not suggest a principled way for the Board to overrule both Congress and the Supreme Court.

Moreover, the call to eliminate preemption ignores a fundamental bargain ratified by Congress in the statutorily mandated employee protective conditions. In return for the carriers' ability to obtain relief from collective bargaining obstacles to the implementation of approved transactions on a relative expeditious timetable, without work stoppages, Rail Labor received extremely generous employee protective benefits not enjoyed by employees in any other industry. *See, e.g.*, *CSX Transportation, Inc. v. UTU*, 36 F.2d 346, 351 (4th Cir. 1996). While urging the Board to jettison half of that quid pro quo, Rail Labor wants to keep these unprecedented protective benefits, which would then become the floor for any RLA bargaining necessary for the carriers to implement approved consolidations.

### C. No Basis Has Been Shown for Changing Established Standards Governing Modification of Collective Bargaining Agreements

Given the legal paucity of their argument that "cramdown" must be eliminated, the argument is apparently an attempt to give credibility to Rail Labor's real position, *i.e.*, that the standards governing the exercise of the authority to override collective bargaining agreements should be made more restrictive. Rail Labor and DOT, however, do not state any basis to "strongly disfavor" modification of collective bargaining agreements or otherwise change the standards developed by the Board and the courts for modifying such agreements.

As in their earlier comments, Rail Labor and DOT describe the Board's procedures and standards for modifying collective bargaining agreements in pejorative terms. According to the labor commenters, "cramdown" is "fundamentally unfair" because it gives too much leverage to carriers and results in the extinguishment, "elimination" and "abrogation" of collective bargaining agreements. RLD Comments at 9; DOT Comments at 16. The Rail Labor Division expresses gratitude that the Board at last is going to "fix" the "serious problems" resulting from prior Board and ICC decisions. RLD Comments at 1.

Rhetoric, no matter how often repeated, is not, however, a substitute for evidence or reasoned discourse. Noticeably absent from the comments of Rail Labor and DOT is any support for their contentions that existing and judicially approved standards for modifying collective bargaining agreements must be restricted. Certainly, they do not contend, nor can they, that the Board's standards are contrary to the language, purposes, or policies of the Board's governing statute. Nor do they offer any basis to depart from the existing standards and precedents.

Rail Labor complains that the *New York Dock* bargaining process is unfair, because carriers allegedly assume a take-it-or-leave attitude in negotiations and arbitrators always decide in favor of carriers. Yet, the undeniable facts are that the vast majority of implementing agreements are reached through negotiation, without arbitration.

Nor is Rail Labor without leverage in the *New York Dock* process. Notwithstanding the supposedly expedited timetable in the *New York Dock* conditions, unions can and do delay the process at every stage. As the Board knows, negotiations, arbitration, and appeal to the Board can take more than a year. And, the Board freely admits using its stay power to encourage the parties to reach settlements.[24] In addition, there is uncertainty in the outcome of arbitration and litigation. Delay and uncertainty are the enemy of most complex business transactions.

And what does labor mean when it says that collective bargaining agreements have been "abrogated" or "eliminated"? In most cases, agreements were neither abrogated or eliminated. Instead, employees from different railroads whose work is being commingled or transferred were placed under one of several existing agreements. And, in most cases, the employees were being placed under an agreement that had been negotiated by their same union with the other carrier. To the extent there are differences in pay or benefits, the employees are made whole for the six-year protective period. Where is the injustice in this?

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[24] For example, the Board's Chairman explained that the Board's "use of stays in the arbitration appeals process" and other Board actions "have all resulted in a more level playing field that has produced more privately negotiated agreements between labor and management than we have seen in recent memory." Testimony of Linda J. Morgan, Chairman, STB, before the Senate Committee on Commerce, Science and Transportation (Sept. 28, 1999).

Rail Labor argues that carriers have overreached and used the Board's processes to override agreements where the necessity test was not met. According to labor, the Board is no help, because "[t]he Board has never found that an arbitrator went too far in saying an agreement could be modified or abrogated." RLD Comments at 10-11. Again, there is no support for these contentions. In CSX's experience, Rail Labor has not often claimed that its proposed consolidations of employees, work or operations under a single agreement have failed to satisfy the necessity test. Instead, Rail Labor has repeatedly attacked the soundness of decisions by this Board and by numerous courts which upheld the Board's authority to override collective bargaining agreements.

For example, in the 1995 *New York Dock* arbitration involving CSX's proposal to combine train operations of several former properties and place employees under a single agreement, the unions did not seriously contest the "necessity" issue or offer any counterproposal to the carrier's proposed change. Instead, Rail Labor simply reargued legal arguments that the ICC had no authority at all to modify collective bargaining agreements, arguments that had previously been rejected by the ICC and the courts.[25] The D.C. Circuit upheld the Board's

25 *CSX Corp. — Control — Chessie System, Inc. and Seaboard Coast Line Industries, Inc. (Arbitration Review)*, Finance Docket No. 28905 (Sub-No. 27) (served Dec. 7, 1995), *aff'd*, *UTU v. STB*, 108 F.3d 1425 (D.C. Cir. 1997).

decision finding that the need to consolidate employees under one agreement was "both obvious on its face and was demonstrated by CSXT." *UTU v. STB*, 108 F.3d 1425, 1431 (D.C. Cir. 1997).

Similarly, Rail Labor has not claimed that the consolidation by other carriers of employees under a single labor agreement, where work was being co-mingled, violated the necessity test or was overreaching in other arbitration appeals. For example, when the union appealed Arbitrator Yost's award consolidating train operations on the Union Pacific and former Southern Pacific, the union did not contest the necessity of the placement of employees under a single agreement. Instead, it argued that the arbitrator had selected the wrong agreement.[26]

The United Steel Workers ("USW") appealed an arbitration award consolidating accounting work on the Union Railroad with that on the Bessemer & Lake Erie Railroad.[27] The award consolidated the work and employees under the

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[26] *Union Pacific Corp. and Union Pacific R. Co. and Missouri Pacific R. Co. — Control and Merger — Southern Pacific Transportation Co., et al. (Arbitration Review)*, Finance Docket No. 32760 (Sub-No. 22) at 5 (served June 26, 1997 (UTU "admits that there are circumstances in which collective bargaining agreements may be merged to effect the goals of mergers. . . .").

[27] *Union R. Co. and Bessemer & Lake Erie R. Co. — Arbitration Review — United Steel Workers of Am.*, Finance Docket No. 31363 (Sub-No. 3) (served Dec. 17, 1998).

Bessemer's clerical agreement. The USW was not appealing this award because the so-called "cramdown" was unfair. The USW was resisting the coordination because it was going to lose members to the Bessemer's clerical union. The USW did not argue that the necessity test had not been met. Instead, it argued that changes in agreements could only be accomplished through the RLA and that the Board lacked jurisdiction.

The only specific alleged abuse cited in the comments of Rail Labor was the Award issued by Arbitrator Fredenberger in the Conrail proceedings. But in that case, the Brotherhood of Maintenance of Way Employees ("BMWE") and IAM petitioned the Board for review of that award, and after the Board issued a stay to encourage the parties to reach a settlement, they reached one. The appeals were withdrawn by the unions. If this negotiated resolution was an unfair result, surely the unions would not have agreed to it. Also, interestingly, in those negotiated settlements, the unions agreed that employees could be placed under a single collective bargaining agreement when employees and work from different carriers were commingled. Moreover, at the arbitration, there was no contention that placing employees under a single agreement was "inherently unfair" or that the so-called "abrogation" of one agreement by putting employees under another railroad's agreement failed to meet the Board's "necessity standard." The primary dispute was over the extent to which work and employees were being commingled.[28]

Notwithstanding Rail Labor's criticisms of the necessity test, Rail Labor recognizes the need to place employees under a single agreement where operations, work, or employees are combined. The NCCC-UTU agreement provides for a single agreement in such circumstances. The TCU Group's proposal also recognizes the need for employees to work under a single agreement in some circumstances.

In sum, because Rail Labor has not really tested the necessity standard, it has no real basis to contend the necessity standard is skewed against labor.

### D. No Basis to Change Requirement that Employees Relocate to Be Eligible for Protection

The Rail Labor Division and DOT have asked the Board to change the existing regulatory requirement that employees relocate to remain eligible for protection under the Board's employee protective conditions. RLD at 11.

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[28] The Fredenberger Award also showed that arbitration is necessary not only to resolve disputes between carriers and unions, but also between unions. In that case, one of the issues resolved in arbitration was a dispute between the shopcraft unions and BMWE. Indeed, of the four arbitration awards flowing from the Conrail transaction, three involved disputes between unions. Two of the four awards were solely the result of intra-union disputes.

As a threshold matter, there is no lawful basis by which the Board may consider any changes to this aspect of its employee protective conditions in this proceeding. No advance notice of such a change was given, as required by the Administrative Procedure Act. The Board's new proposed § 1180.1(e) proposes no change to the relocation requirement in *New York Dock* and other employee protective conditions. As such, there is also no basis for Rail Labor Division's characterization of the Board's comments in its Notice of Proposed Rulemaking as "recognizing that mandatory transfers of employees pose serious concerns . . . ." RLD Comments at 12.[29]

In addition, the Rail Labor Division and DOT still have not shown any basis for altering this requirement. They are asking that employees be paid a separation payment or up to six years of dismissal allowances, even though they have not been dismissed by the carrier and the carrier has a need for them. This obviously would be a substantial enhancement to the *New York Dock* conditions and contrary to their basic underpinning that carriers only compensate employees when a transaction causes an employee to suffer a loss of earnings. Rail Labor cannot

[29] The relocation issue is pending in *Norfolk Southern Corp. — Control — Norfolk & W. Ry. Co. and Southern Ry. Co. (Arbitration Review)*, Finance Docket No. 29430 (Sub-No. 21) (served Dec. 15, 1999).

show "unusual circumstances" justifying such an enhancement, as required by Board precedent.

As previously explained, the Board rejected just such a proposed enhancement requested by TCU and supported by DOT in the Conrail proceedings. Decision No. 89, Finance Docket No. 33388 at 128 (served July 23, 1999). The Rail Labor Division and DOT offer no new reasons for the Board to reconsider their similar request here. All they contend is that the next rail merger will likely be a transcontinental merger. However, assuming that is true, a transcontinental merger does not necessarily mean that employees will be moving coast to coast, as Rail Labor suggests. For example, the current headquarters of the major U.S. rail carriers are located in Omaha, Ft. Worth, Jacksonville, Norfolk, Chicago, and Kansas City. Not a single major carrier has a headquarters on the West Coast.

Accordingly, any relocations in the foreseeable future would most likely be similar in distance to prior merger relocations. For example, in the recent Conrail transaction certain clerical employees relocated from Philadelphia and Pittsburgh to either Norfolk or Jacksonville. In prior consolidations involving CSX's predecessors, employees were relocated from Cleveland, Baltimore and Richmond to Jacksonville. In connection with the absorption of the Southern Pacific by the Union Pacific, employees relocated from San Francisco and Sacramento to Omaha.

In connection with consolidations that created the present day Burlington Northern Santa Fe, employees relocated from Minneapolis and Chicago to Ft. Worth.

Nor has the Rail Labor Division or DOT shown any support for their conclusory supposition that future mergers are likely to have greater impacts on employees than past mergers. Indeed, this supposition is contradicted by the assertion by Rail Labor that there is no need for "cramdown" because future mergers will be end-to-end and therefor will present less opportunities for consolidation of facilities and operations. *See, e.g.*, ARU Comments at 4.

Moreover, the Rail Labor Division and DOT never address the obvious unfairness and inefficiencies of their request. The carriers would lose valuable and experienced employees. At the same time that the carrier would be required to pay very expensive protection to employees who chose not to relocate, the carrier would also have to pay wages to new employees that it will have to hire and train to replace more experienced employees. CSX previously explained in its Reply Comments in the ANPR phase that, as a result of the Conrail transaction, it transferred about 209 contract employees. Under the Rail Labor-DOT proposal, CSX would have lost many of these employees, been required to pay them protection, and been forced to hire and train new employees, probably doubling CSX's cost associated with those transfers. This proposed enhancement to *New York Dock* also makes no sense given the Board's efforts in its proposed rule to insure that future transactions do not result in a deterioration of rail service during implementation.

### E. No Basis to Require Test Period Averages

A requirement that carriers automatically provide employees their test period averages would be another modification to the Board's *New York Dock* conditions. As with Rail Labor's request to modify the relocation requirement, there is no basis in this proceeding to consider this change, because there has been no notice that the Board is considering such a change. Nothing in the Board's Notice of Proposed Rulemaking or proposed § 1180.1(e) addresses the issue of test period averages.

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In sum, Rail Labor has provided no support, other than empty rhetoric and long discredited legal arguments, for the Board's proposal to amend § 1180.1(e) to disfavor the modification of collective bargaining agreements. As shown in the comments of the NRLC, with which CSX joins, Rail Labor's concerns can be adequately addressed on a case-by-case basis consistent with existing statutory, judicial, and Board authority in those few instances where the parties are unable to negotiate the required implementation agreements.

## VII. FEARS THAT APPLICANTS SHOULD NOT BE ALLOWED TO PROPOSE SOLUTIONS OR NEGOTIATE TERMS ARE UNFOUNDED

A number of commenters, including the U.S. Department of Agriculture, contend that applicants should not be permitted to negotiate terms with third parties or to propose conditions that would render a merger competitively harmless. The Board should not heed these calls, as such negotiations and applicant proposals are efficient and do not pose the problems alleged.[30] The NPR does not require that the Board relinquish its authority to approve or condition mergers. Indeed the proposed rules expressly retain the Board's authority over mergers, including the ability to disapprove or condition mergers against the applicants' will if necessary in the public interest. The proposed rules have asked that the applicants work out terms privately where labor and service assurance terms can be negotiated. This is consistent with past approaches to mergers, including the most recent Conrail acquisition and CN/IC. Private negotiation frees the process from regulatory micromanagement, is more apt to create win-win outcomes, and makes a better use of scarce public resources. Under the proposed rules, however, the Board retains full power to review and approve the terms of a transaction.

[30] *See, e.g.*, USDA at 21; National Grain & Feed Ass'n at 11, PPL at 14, and North Dakota P.S. at 2.

Other shippers, including Enterprise and IMC, are concerned that, because the new rules put the initial task of identifying the potential problems related to the proposed merger in the hands of the applicants, the applicants will succeed at subverting the Board's review. These concerns are baseless. The applicants are in the best position initially to identify the potential competitive problems and redress. Applicants analyze the proposed transaction before they file their notice of intent with the Board and use their own financial resources to analyze the competitive effects of the proposed transaction to determine whether or not to pursue it. Asking the applicants to submit such analysis to the Board does not compromise the Board's authority, but advances it. Moreover, the new rules by no means leave this important analysis to the applicants. The Board will only begin its statutory mandate by starting with the applicants' identification of potential problems, and the Board is in a better position to advance its own analysis with this information.

It is also important that the applicants be permitted to explain the full network efficiencies that the intended merger is designed to produce. Should the Board determine that merger conditions are necessary to preserve competition, it needs to have enough knowledge to impose the most effective conditions, *i.e.*, conditions designed to preserve competition without undermining unnecessarily network efficiencies that benefit shippers overall. Working from a proposal by the applicants as to remediation will enable a focused starting point. Like any competition enforcement agency, the Board will review and investigate the proposed efficiencies proffered by the applicants and subject them to its own analysis. The proposed rules, however, at least provide a means of identifying claimed network efficiencies so that if they bear up under the Board's analysis, they will be preserved to the extent possible and not overlooked unnecessarily. Accordingly, allowing the applicants to explain them is indeed necessary to the public benefit analysis.

## VIII. PASSENGER SERVICE

Amtrak and a number of commuter agencies and organizations with an interest in passenger rail (collectively, the "passenger rail agencies")[31] submitted comments on the NPR. As explained below, CSX agrees with certain of the comments. However, CSX respectfully disagrees with others that improperly seek to obtain, through the Board's merger regulations, rights that the passenger rail agencies plainly do not have under any federal statute or under their contracts with

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[31] These passenger rail agencies include the Amalgamated Transit Union ("ATU"), American Public Transit Association ("APTA"), National Railroad Passenger Corporation ("Amtrak"), State of Maryland Department of Transportation, Maryland Mass Transit Administration (on behalf of MARC), Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois ("Metra"), New Jersey Transit Corporation ("NJT"), State of New York, and Southern California Regional Rail Authority ("SCRRA," filed jointly with MARC).

freight railroads. As the Board has repeatedly recognized, the rights and obligations as between a freight railroad and a passenger rail agency are primarily a matter of private contractual negotiation, not government regulation. *Conrail*, Finance Docket No. 33388, Decision No. 89 at 96-97 (served July 23, 1998). This is due to the fact that each proposed passenger operation presents a complex and unique set of circumstances, including "intricate details concerning rail operations, capital expenditures, and compensation." *Id.* at 97. Thus, the circumstance of a merger between two freight railroads does not warrant any change in the fundamental relationship between freight railroads and passenger rail agencies. And nothing in the Board's NPR suggests that the Board seeks to depart from its well-established precedents with respect to freight/passenger issues.[32]

Nevertheless, CSX recognizes that the potential impacts of a proposed merger on passenger rail services are properly considered by the Board in its evaluation of the public interest, along with other public interest considerations, as is set forth in the NPR. The comments made by some passenger agencies reveal, however, that some of the proposed provisions which deal with impacts on passenger rail services might be susceptible to interpretations the Board does not

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32 Certain of the passenger rail agencies have taken this opportunity to express displeasure about certain service difficulties that followed the Conrail transaction. CSX has addressed these matters in other proceedings before the Board and will not respond to these comments here.

intend. In response to these comments, CSX offers certain clarifying amendments to the NPR and explains its reasons why the Board should reject certain other amendments offered by passenger rail agencies:

Section 1180.1(a). NJT proposes amending the second sentence of this general statement about the railroad industry and its place in the freight transportation network to include an express reference to passenger rail. As explained in more detail below, this proposal should be rejected: the freight transportation network should be kept separate for purposes of merger analysis from the passenger transportation network.

Section 1180.1(c)(2)(ii). In its general policy statement, the Board includes among the public interest considerations potential harm to passenger rail services. Specifically, Section 1180.1(c)(2)(ii) provides in pertinent part:

> The Board must ensure that essential freight, passenger, and commuter rail services are preserved. An existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available.

Some commenters (such as Metra and NJT) approve of the Board's proposal to evaluate potential impacts on passenger rail services under the "harm to essential services" test, a standard previously applied by the Board solely in the context of the freight transportation network.

CSX believes that the Board should apply its established test of "essential services" in this connection. However, the analysis of the freight transportation network should be conducted separately from the analysis of the passenger transportation network; the use of the same standard does not mean that the methods of analysis should be identical. Moreover, contrary to the suggestions of ATU, MARC, NJT and SCRRA, there should be no general presumption that the preservation of passenger rail services takes precedence over freight rail services or other public interest considerations, given the absence of federal legislation supporting such a general presumption.[33] The Board must assess the potential impacts on passenger rail services in the light of all the facts presented by the merger application before it and must narrowly tailor any conditions to address effects directly related to the transaction.

Section 1180.1(d). MARC, Metra and SCRRA propose amending this provision relating to the Board's conditioning authority to include an express reference to the power of the Board to impose conditions for the benefit of passenger rail agencies. CSX believes that the language proposed by the Board is broad enough to allow for the imposition of appropriate conditions relating to passenger rail services; the Board should not attempt to articulate each public

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33 CSX recognizes, of course, that Amtrak enjoys certain rights under federal statute.

interest consideration that could support the imposition of a condition. Moreover, CSX specifically rejects the suggestions made by a number of passenger rail agencies that the Board should require freight railroads, as a condition of a merger, to fund the infrastructure improvements required by passenger rail service or that the Board should somehow grant access rights for additional passenger services not agreed to by the freight railroads. As explained above, these matters are properly determined by private contractual negotiation.

Section 1180.1(h)(3). APTA requests (at 4-5) that passenger agencies be expressly included in the Service Council. CSX does not object to this proposal. CSX could not object more strongly, however, to the added suggestion that a freight railroad could not deviate from its projected freight volumes without formal approval from the Board or some other entity, such as a Service Council. This suggestion is contrary to the common carrier obligations of freight railroads, does a disservice to the public interest in the most economical and environmentally positive transportation of freight, has no support in Board precedent, and must be rejected out of hand.

Section 1180.1(e). ATU makes the strange suggestion that labor protection be afforded to passenger rail employees affected by freight rail mergers. This suggestion has no legal support and should be rejected without further ado.

Section 1180.1(g). MARC and SCRRA propose amending this provision relating to the oversight process expressly to include passenger rail within the issues subject to the Board oversight. CSX believes that the language proposed by the Board is broad enough to encompass the consideration of passenger rail issues in the oversight process. The Board need not separately articulate each and every potential issue.

Section 1180.7. Because of the references to "essential services" in this provision, Metra interprets Proposed Section 1180.7 to require market analyses of passenger rail services as well as freight rail services.[34] CSX does not believe that the Board intended to require market analyses of passenger rail services, and in any event, CSX would object to such a requirement. The thrust of the provision plainly is analysis of impacts in the freight network, not the passenger network. Metra's confusion on this point illustrates the need to separate evaluation of potential harm to passenger services from potential harm to essential freight services, as CSX has recommended above.

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[34] APTA similarly urges the Board (at 3) to require merger applicants "to address separately and specifically the issue of competitive harm to passenger rail projects." This proposal makes no sense to CSX.

Section 1180.10(b). This provision requires coordination between freight and passenger railroads. The passenger rail agencies have suggested four amendments.

First, Amtrak has suggested (at 6-7) that performance data for the year preceding the transaction be supplied with respect to passenger rail service, similar to the benchmark performance data required in Proposed Sections 1180.10(a) and (c). CSX does not object to this suggestion.

Second, MARC, the State of New York and SCRRA seek to extend the operations descriptions required by the first sentence of this provision to lines owned by the passenger agencies as well as lines owned by the freight railroads. CSX objects to this proposal. The Board need not increase the applicants' obligation; the passenger rail agencies can protect their interests in lines they themselves own through the contracting process. Moreover, the communication protocols required by the second sentence of this provision apply to all lines, whether owned by applicants or the passenger agencies.

Third, MARC, Metra and NJT request that this section be amended to specify that the required operating descriptions and communication protocols should be prepared after consultation with the relevant passenger agencies. CSX does not object to this proposed amendment.

Finally, APTA and NJT assert that service assurance plans should address certain planned rail passenger projects as well as existing passenger rail services. CSX does not object to including in a service assurance plan passenger rail projects which are the subject of a contract between the freight railroad and the passenger rail agency and for which public monies have been committed. However, the specific language proposed by NJT (at 9) is too broad.

Section 1180.10(d) and (i). Amtrak seeks (at 3-5) a numerical threshold that would trigger the required analysis of potential infrastructure impediments and preparation of contingency plans. While CSX does not believe that the regulatory process would be improved by a one-size-fits-all numerical threshold, CSX would not strongly object to Amtrak's proposed threshold of an increase of four or more freight trains per day on an average daily basis.

Section 1180.10. Amtrak (at 7-9) asks the Board to add a provision requiring applicants to demonstrate in their service assurance plans that "key portions of their rail systems will not require major maintenance work during the implementation of their proposed merger." CSX does not object to the suggestion that plans for major track maintenance are appropriately addressed in a service assurance plan. However, CSX would object to the addition of a strict requirement that all planned major maintenance be completed prior to merger implementation. The appropriate timing of maintenance work depends on many factors (including safety requirements, contractual agreements with various railway brotherhoods, and freight common carrier obligations, among others), and must be determined in light of the specific circumstances presented. Of course, many rail mergers, including the Conrail transaction, have provided the impetus for revitalization of the rail infrastructure, one of the long-term benefits of rail mergers. It is unavoidable that some short-term delays be suffered in order to achieve long-term improvements in service. There should be no firm rule regarding the timing of the maintenance. The postponement of the efficiencies of beneficial mergers would not be in the public interest.

Metra also requests (at 3-5) that service assurance plans give some attention to important junction points. CSX does not object to this suggestion. Critical junction points would be an appropriate topic for consultation between the freight railroads and passenger rail agencies.

In conclusion, CSX agrees that impacts to passenger rail services should be considered by the Board in its evaluation of the public interest, and that passenger rail agencies should be consulted throughout the merger application process, commencing prior to filing the application and extending through the oversight period. However, CSX disagrees with proposals that suggest that the cost of approval of a merger application is the grant of substantial new rights to passenger rail agencies which they do not now have under any federal statute or under their contracts with freight railroads. CSX recommends that, in order to avoid confusion, the Board separate its analysis of the passenger network from its analysis of the freight network.

## IX. OVERSIGHT AND SERVICE COUNCIL ISSUES

In Proposed § 1180.1(g) the Board proposes to formalize the practice it has followed in recent merger proceedings of retaining jurisdiction and maintaining oversight for a period of years (five years in recent transactions; "at least five years" in the proposal). The proposal appears to "push the envelope" of prior practice by including as an object of oversight the timely realization of merger benefit projections, a topic not mentioned in the two most recent transactions involving Class I railroads. *Compare* NPR at 19 *with Conrail*, Decision No. 89, Finance Docket No. 33388, served July 23, 1988, at 160-61 and 173-74, *and with CN/IC*, Decision No. 37, Finance Docket No. 33556, served May 25, 1999, at 56. CSX does not object to that proposed specific broadening of oversight involved in the proposal. CSX would note, however, that predictions are made from the vantage point of a certain moment in time; that the only thing that is constant with respect to economic conditions is that they change, and often change rapidly; and that any comparison of predictions with results has to be made with that in mind. *See also* the discussion in Part IV.

The jurisdiction retained by the Board to impose additional conditions and to revise existing conditions is a subject which must ride two horses that tend to go in different directions. On the one hand is the regulatory desire to be able to adapt the merger conditions to changing circumstances and to deal with perceived imperfections in the conditions. On the other is the need of the carriers for finality and their need to preserve the economics which they perceived in the merger transaction — economics which could be altered or impaired if the retained authority to impose additional conditions were exercised up to the very broad and unspecific limits the Board's language generally uses,[35] assuming (probably contrary to fact and law) that the retained jurisdiction lawfully could be applied without any real limits.

It is, as the Board has indicated, necessary that there be finality to the action of the Board in authorizing a merger transaction. As the Board has put it, when the Board approves a transaction, it weighs the "the burden the condition imposes upon the application and on the public interest against the benefit derived form the condition. Here, applicants have assessed the various conditions we imposed and

[35] Particular topics to be the focus of oversight are often identified: *see Conrail*, Decision No. 89, at 106-61, 174 n.262; *CN/IC*, Decision No. 37, at 56. But there generally is a "by no means limited to" (*Conrail*, at 174 n.262) or an "including without limitation" (*CN/IC* at 56). So the extent of oversight and condition revision purports to be boundless.

have proceeded with . . . implementation of this major transaction that we approved as further the public interest." Thus, says the Board, a party would "have to make a strong showing of competitive or other harm in order to obtain additional relief." *Conrail*, Decision No. 124, served May 20, 1999, at 5. A prerequisite for attaching new or substantially revised conditions, it seems to CSX, is whether the specific terms of retention of the oversight jurisdiction give fair notice to the combining carriers of the specific type and nature of the additional or modified conditions that might be imposed. If they do not, the judgment that the Board says that the carriers must make before deciding to accept the terms of the Board's approval and implement the transaction cannot rationally be made. In CSX's view, the need for "due notice" is potentially one of the great values in the Board's proposal to look at the "downstream" effects of merger transactions to take a look at what the competitive reaction of the rest of the rail industry might be to them. It may well be that the greatest good to come from the ending of the "one case at a time" rule is not for the Board to pass on mergers that have not yet been proposed — a caricature of the Board's views that some commenters have engaged in — but to give fair warning to the applicants in the transaction under the Board's review as to what sort of adjustments in their conditions might be anticipated if a certain response is in fact made and authorized by the Board.

Certain commenters would broadly change the scope of the Board's retention of oversight jurisdiction so that the applicants could be made responsible for any unforeseen consequences — competitive, environmental, or otherwise — of the transaction that emerge in the first five years — or later. In connection with this, the comments of the Ohio Rail Development Commission, in fact, reject an important principle articulated by the Board in Proposed § 1180.1(f) and the related discussion at NPR at 18. That principle encourages and favors negotiated agreements between applicants and communities and other entities that may be affected by a transaction. ORDC's comments, in a contrarian fashion, expressly oppose negotiated agreements[36]. They express concern that some impact may be left unremediated by any voluntary agreement. So they seek to enlarge the Board's continuing role as a regulator by establishing that the applicants must take responsibility for every harmful impact that occurs as a result of a transaction, of course, without getting credit for the public goods. So if a transaction improves the economy of a state or community by improving its transportation options and creating and fulfilling greater demand for rail service, resulting in a restoration of local industry and an increase in jobs, but with a concomitant need for additional grade crossing protection and with more frequent horn and other noises, the state

[36] *See also* the related discussion in Part VII, above.

or community is to accept the benefits but send the consolidated railroad a bill for the mitigation of the adverse impacts. Such an approach is not required by the Board's statute or by the National Environmental Policy Act, which in effect requires the Board to use its judgment after a diligent review of conditions as far as they can be known at the time of its authorization. Indeed, if an EIS is prepared, that Act does not require mitigation of adverse impacts at all, though the Board has generally, and in many cases properly enough, expected that the carriers would do so.[37]

The approach of the Ohio Commission is wrongheaded and would discourage, in particular, truly beneficial transactions, namely those that would increase the demand for and the supply of rail services. Here again, the Board has got it right: the parties should be permitted and encouraged to deal with and recognize problems, estimate their scope, and work out an agreement that best compromises their wishes to the extent that they are incompatible and best serves their interests to the extent that they are compatible. Such agreements can operate within the economic parameters that are consistent with the benefits foreseen from the transaction, and can provide assurances to both sides. Imposing further

37 Particularly in the context of an EIS, the continuing nature of environmental supervision and mitigation expressed in the NPR at 19 n. 11 appears inappropriate and unwarranted by the statute.

conditions in the oversight period despite those agreements or despite the Board's best efforts in the approval process to resolve the issues itself, or open-ended requirements of mitigation of all post-transaction impacts, can radically alter the economics and the benefits of a transaction. The possible presentation of an unforeseen bill to the railroads on a continuing basis after the transaction is completed can only have the effect of inhibiting beneficial transactions.[38]

If anything, even wider of the mark is the proposal made by Kansas City Southern Railway to subject Class I railroad which have consummated a Board-approved transaction in the past five years to be subject to oversight under the new rules to be determined in this proceeding, both procedural and substantive. KCS at 20.[39] That would be a clear case of materially changing the rules for a

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[38] The Board in launching the present rulemaking proceeding in the ANPR generally put environmental issues beyond the scope of the proceeding, but those issues are implicated by the Board's oversight provisions, which are, of course, part of the proposals in the NPR. Moreover, some commenters have made in their opening comments pertinent and useful comments on the conduct of environmental review in recent mergers, notably those made by the Norfolk Southern comments. NS at 53-57. The NS comments very properly urge a strict confinement of environmental review to the foreseeable impacts of the transaction itself.

[39] KCS also repeats a comment which it made in the ANPR stage, which CSX opposed and which the Board chose not to include in the NPR. That is the proposal that all settlement agreements be submitted to the Board for its consideration and approval, not simply those which are sought to be imposed as conditions or which otherwise require the Board's authorization in order to be implemented. KCS at 14. CSX stands on its reply to that proposal in the ANPR phase (and its reply to another ANPR proposal (reciprocal shipping look-back) also

Footnote continued on next page

transaction after its consummation, and in a fashion which could radically change its economics. The purpose of the Board's rulemaking activity — and one of the purposes of the Board's halt of major merger activity for a 15-month period while the new rules were being formulated — was to create a level playing field going forward, so that all parties would know the rules for mergers from now on. That approach is completely inconsistent with making the new rules, or any part of them, retrospective to cover consummated transactions.[40] In this and other aspects of oversight, the Board must be careful not to intrude materially into the finality of transactions it authorizes. We note that the Board has recently rejected this same proposal made by another party: "[California PUC's] suggestion to apply our proposed merger guidelines to mergers that have previously received our approval is clearly inappropriate." *UP/SP*, Finance Docket No. 32760 (Sub-No. 21), served Dec. 15, 2000.

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Footnote continued from previous page
resurrected by KCS and set forth at KCS at 15). Like the comments discussed in Part VII above, the proposal as to settlements could hamper negotiated commercial solutions which are apt to be wiser than nonconsensual regulatory conditions.

[40] The KCS proposal would thus include within its scope most of the Class I and comparably sized Canadian carriers, including UP, NS, CSX and CN. It would exclude KCS, which has not been a party to a major merger in the past five years. KCS also has renewed its efforts to take itself out of the category of Class I carriers. *See* KCS at 5-7.

A very constructive development related to the oversight process has been the commencement of an effort to supplement the traditional formal, forensic-style form of oversight with more flexible and informal structures. To be sure, there will remain formal oversight, generally involving an annual report with rounds of comments — some requesting modification of conditions, leading to formal decisions by the Board[41] — and involving the possibility of formal petitions to the Board. These new structures are process-oriented rather than litigation-type endeavors; they include the operational monitoring process, with its monthly and weekly reports and conference calls designed to keep the Board, through its Office of Compliance and Enforcement fully informed.

Some commenters make proposals as to the specifics of the operational monitoring. In CSX's view, the suggestions are better suited for informal review by the Office of Compliance and Enforcement than for the rulemaking procedure itself. In that regard, CSX notes the Board's practice of delegating the power to modify the content of the monitoring reports to that Office. *See Conrail*, Finance Docket No. 33388, Decision No. 89, served July 23, 1998, at 165.

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41 *See, e.g.*, *Conrail*, Finance Docket No. 33388 (Sub-No. 91), Decision No. 3, served November 30, 2000 (denying condition modifications to Indianapolis Power and Light Company).

One of these proposals is that of the NITL, which argues that as part of the operational monitoring process, the applicants should be required to provide "information on transit times and/or cycle times over major corridors for the year prior to the application, and then should be obligated to provide that information on a continuing basis following the implementation of the transaction." NITL at 25-26. CSX's recent announcement of an internet-based system to provide "transit time information" is cited favorably by the League.

It would be premature for the Board to determine every category and detail of operational monitoring data that should be required. The availability of specific categories of operational measurements may vary from time to time. Transactions are not "cookie-cutter" in their similarity and different transactions may present differing monitoring issues. Proposed § 1180.1(c) sets forth a specific set of data which is not all-inclusive and does not preclude use of other information as determined in a particular case formally by the Board or informally by the Office of Compliance and Enforcement.

Door-to-door transit times are clearly important information for a given shipper. However, it would be naïve to believe that a set of average car transit times over a "major corridor" could be translated into door-to-door transit times. The CSX transit time information which NITL cites favorably provides only broad, general information about historic transit times between rate districts. This information, which CSX currently makes available to its customers, is designed as a customer service tool — not as a management performance measurement. The distinction is very important. It is one thing for CSX to choose commercially to give customers a general idea as to average transit times between two very broad districts (they approximate BEA's in size) where actual transit times vary substantially depending on the location of the shipper within the district. It would be quite another for CSX management to make operational/managerial decisions based upon that information (or for the Board, similarly, to use that information for management monitoring). CSX management does not do so because the information has no real value as a managerial tool. For the Board to engage in operational monitoring using the wrong kinds of measurements could be worse than operational monitoring with no data at all.

A second NITL proposal, that applicants provide car cycle times over "major corridors," seems to reflect confusion about the utility of car cycle time information and assumes 100% empty return of freight cars. Many cars do indeed return empty, but measuring car cycle time between terminals or over major corridors (however defined) would have no managerial value and little monitoring value either.

In any event, to the extent that NITL's proposals (or anyone else's proposals) are useful in a particular monitoring situation, the Board or the Office of Compliance and Enforcement could require them on an *ad hoc* basis.

A new nonforensic accompaniment to the oversight practice that has generally been well received by commenters is the Service Council, first employed in the Conrail case as the "Transaction Council," and endorsed by the Board in Proposed § 1180.1(h)(3). The Board's proposal indicates that such Service Councils should be comprised of "other interested parties" in addition to the railroads and their shippers (*see* NPR at 19) and CSX believes that the expansion of the Service Councils in that respect would be useful. Representatives of affected shortlines, passenger and commuter authorities, and ports, as well as of railroad labor, could bring new perspective to the Councils. It has been CSX's experience that the terms of discourse in Council sessions is more candid and constructive than that in formal proceedings. Although very clearly the added groups would have some differing objectives, CSX believes that the effect of inclusion would tend to favor the building of bridges rather than the digging of moats. An expanded Service Council would be a useful supplement to the Board's formal oversight and its operational monitoring activities.

## CONCLUSION

The Board has gotten many of the answers to the issues "right." CSX proposes some fine-tuning in a few of those cases. On the issue of whether a "bundle" of merger unrelated competitive enhancements should be part of every rail merger application, CSX points to the negative reaction of the shipper community to that proposal. That reaction complements the reaction of CSX and other major railroads. CSX's proposals with respect to competition are discussed in the foregoing Comments at Parts I through III. CSX urges the Board to give consideration to and adopt its Comments as presented herein and in its Opening Comments.

Respectfully submitted.

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December 18, 2000

## CERTIFICATE OF SERVICE

The undersigned counsel for CSX Corporation and CSX Transportation, Inc. hereby certifies that on this 18th day of December, 2000, a copy of the foregoing "Reply Comments of CSX Corporation and CSX Transportation, Inc.," was served on all parties of record by first-class mail, postage prepaid, or more expedited method.

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